

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-218416 **DATE:** July 25, 1985
MATTER OF: Mid-Atlantic Service & Supply
Corporation
DIGEST:

1. Where the specifications for sun control window film are reasonably related to the government's minimum needs, the fact that the specification may call for a patented item which is only available from one source does not make the specification unduly restrictive.
2. GAO generally will not consider a protest allegation that agency's needs are different from those the agency seeks to satisfy, since the determination of its needs is a matter for the agency.

Mid-Atlantic Service and Supply Corporation alleges that the specifications in invitation for bids (IFB) No. GS-11B-52034, issued by the General Services Administration, are proprietary in nature and thus unnecessarily restrict competition. Mid-Atlantic also argues that the specifications will not satisfy the government's actual needs.

We deny the protest in part and dismiss it in part.

The solicitation covers the installation of sun control window film on a building occupied by the Office of Personnel Management (OPM) in Washington, D.C. The film is to be applied to windows on all four sides of the building in order to retard the flow of heat energy through the windows. As stated in the solicitation, this involves the application of the film to approximately 2,343 windows with a total surface area of approximately 63,000 square feet.

GSA received four bids by the scheduled opening date of March 28, 1985. The protester did not submit a bid. The apparent low bid was submitted by Solar Master Film Corporation in the amount of \$62,820.

Mid-Atlantic contends that one of the film characteristics required by GSA is proprietary in nature and, consequently, restricts competition unnecessarily. The specification challenged by Mid-Atlantic requires that the film offered have a U-value 30 percent lower than that of 1/4 inch clear plate glass. U-value, a measure of the temperature transmission of windows, is the ratio of the heat gain through the window to the temperature difference between inside and outside air. The lower the U-value, the lower the heat gain or loss through the window. Mid-Atlantic maintains that GSA effectively limited competition to one manufacturer that has patented a process to produce film with the required low U-value, the 3M Company, and to the manufacturer's sole dealer. Mid-Atlantic also argues that the specifications do not properly address the major need of the procuring agency, to reduce the heat gain from the sun through the windows on three sides of the building.

In responding to contentions that a particular specification is unduly restrictive, we recognize that contracting agencies have broad discretion in determining their minimum needs and the best methods of accommodating those needs. Potomac Industrial Trucks, Inc., B-204648, Jan. 27, 1982, 82-1 CPD ¶ 61. We will not question an agency's determination of its minimum needs unless there is a clear showing that the determination has no reasonable basis. When, however, a protester challenges a specification as unduly restrictive, it is incumbent on the contracting agency to establish prima facie support for its contention that the restriction it imposes is reasonably related to its minimum needs. Once the agency establishes this support, the burden is on the protester to show that the requirements complained of are arbitrary or otherwise unreasonable. Amray, Inc., B-208308, Jan. 17, 1983, 83-1 CPD ¶ 43.

In addressing Mid-Atlantic's first contention, we note that the number of sources for an item does not determine whether the specification for the item unduly restricts competition. The fact that a particular specification is proprietary in nature or requires a patented item or process does not necessarily indicate that the specification is unduly restrictive. See Hyaro Conduit Corp., B-188999, Oct. 11, 1977, 77-2 CPD ¶ 282. To the contrary, as long as a particular specification is reasonably related to the procuring agency's minimum needs, the fact that there is only one source does not make the specification unduly restrictive. The Trane Co., B-216449, Mar. 13, 1985, 85-1 CPD ¶ 306. Conversely, the fact that four

firms bid on the subject solicitation also does not necessarily establish that the specification is reasonable. See B. J. Sales Inc., B-213121, Jan. 25, 1984, 84-1 CPD ¶ 118.

The IFB required bidders to provide data from an independent test laboratory establishing that the film offered has a U-value at least 30 percent less than that of clear plate glass under several sets of conditions. In justifying this requirement, GSA largely relies upon a recent study by the National Bureau of Standards, "Energy and Cost Evaluation of Solar Window Film Use in an Office Building," NBS Technical Note 1174. For regions with climates similar to Washington, D.C., the study concluded that film having the lowest U-value of those tested was most cost-effective. When the temperature difference between the inside and outside air was 70 degrees, the most cost-effective film had a U-value between 28 and 29 percent less than that of clear glass. In a previous procurement of window film, GSA had required a U-value 35 percent below that of clear glass, and the agency concluded that there were products available to meet the less restrictive standard in this case. The agency was apparently correct, since four firms submitted bids and presumably offered film complying with the specifications.

The protester asserts that prior procurement history is not relevant because the 3M Company has recently begun enforcing its patent rights, so that previously available low U-value films have been removed from the marketplace. However, Mid-Atlantic has provided no information to support its general assertions. The firm did not address the specific U-value of film that it might provide, or the U-value of any other film, including the 3M film that Mid-Atlantic believes is the only one that would satisfy the IFB requirements.^{1/} Mid-Atlantic has not addressed

^{1/} While Mid-Atlantic does assert that it could supply film with a U-value of .84, it has not related this allegation to the conditions under which such a U-value could be achieved. The U-value of film varies with the temperature difference between inside and outside and the wind speed. A U-Value of .84 might be high or low, achievable or impossible, depending upon the weather conditions. The IFB does not require a specific U-value; it requires a relative U-value (30 percent less than the U-value of clear glass). Mid-Atlantic provided no information comparing the specifications or available products specifically to the relative U-value requirement of the solicitation.

the Bureau of Standards' conclusion that the lowest U-value film is the most cost-effective, or the fact that four vendors were apparently able to meet the specification. In sum, the protester has not established that the challenged restriction is unreasonable.

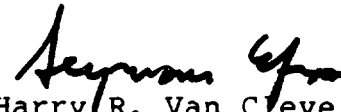
Mid-Atlantic also contends that the specification does not describe the government's minimum needs. Mid-Atlantic claims that employees in offices on the south, east and west sides of the OPM building suffer from overheating during the winter months. This problem results from high amounts of solar radiation being absorbed by the untreated windows. Combined with the heat generated by the building heating system, the solar radiation allegedly raises the temperature level in the offices to an uncomfortable level. Consequently, according to the protester, film with a greater ability to reduce heat gain from sunlight than that specified in the solicitation should be applied to the three sides of the building. Further, since problems in the winter stem from too much heat on three sides of the building, GSA should be concerned about heat-retaining solar film (film with a low U-value) only on the north side of the building.

Mid-Atlantic's statement that a low U-value film is only necessary for one side of the OPM building does not take into account the economic benefits of the film. The National Bureau of Standards based its conclusion that the lowest U-value window film is the most cost-effective on a year-round study. In the summer, less of a demand is placed upon the cooling system, and during the winter, as Mid-Atlantic points out, less heat is required for window offices from the building heating system. The protester has not addressed the effect of low U-value film during the cooling season, or suggested any reason why heat from the building heating system cannot be reduced for window offices in the winter, thereby reducing the agency's annual operating cost for the building.

We will not consider the protester's argument that film having a greater ability to reduce solar radiation would better meet GSA's needs. Under the Competition in Contracting Act of 1984, we consider protests by interested parties. 31 U.S.C.A. § 3553(a) (West Supp. 1985). An interested party is defined in the act to be an "actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract." 31 U.S.C.A. § 3551(2) (West Supp. 1985). This definition is reflected in our Bid

Protest Regulations. 4 C.F.R. § 21.0(a) (1985). Mid-Atlantic has not suggested that it cannot supply film meeting the solar heat reducing properties required by the IFB, or that it is economically affected by this aspect of the specifications in any way. Consequently, it is not clear that Mid-Atlantic is an interested party with respect to the issue. See Sentinel Electronics, Inc., B-212770, Dec. 20, 1983, 84-1 CPD ¶ 5. In any event, Mid-Atlantic's contention that the government should be seeking to reduce solar retention and should buy film that would accomplish that purpose raises an issue of agency policy that we generally do not consider. It is the agency that must determine its needs, and we will not consider a complaint such as the protester's unless there is a showing of possible fraud or willful misconduct, neither of which is alleged here. See Security Assistance Forces & Equipment OHG, B-209555, Nov. 16, 1982, 82-2 CPD ¶ 449. Accordingly, we dismiss this portion of Mid-Atlantic's protest.

We deny the protest in part and dismiss it in part.

for 
Harry R. Van Cleve
General Counsel